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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Wade Patrick, a married man, et al.,

10 Plaintiffs,

11 v.

12 Costco Wholesale Corporation, a
13 Washington corporation doing business in
14 Arizona, et al.,

15 Defendants.

No. CV12-2633 PHX DGC

ORDER

16 The parties have filed several motions. Because the Court concludes that
17 Plaintiffs' motion to remand is well-taken, the Court will not address Defendants' motion
18 to dismiss. The Court will also deny Plaintiffs' motion for sanctions.

19 Under 28 U.S.C. § 1441, any civil action brought in state court over which the
20 federal district courts have original jurisdiction may be removed to the federal district
21 court for the district where the action is pending. 28 U.S.C. § 1441(a). There is a "strong
22 presumption" against removal and "[f]ederal jurisdiction must be rejected if there is any
23 doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564,
24 566 (9th Cir. 1992). "The 'strong presumption' against removal jurisdiction means that
25 the defendant always has the burden of establishing that removal is proper." *Id.* "If at
26 any time before final judgment it appears that the district court lacks subject matter
27 jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

28 Removal in this case was based on diversity jurisdiction and an amount in dispute

1 of more than \$75,000. Where, as here, “the complaint does not demand a dollar amount,
2 the removing defendant bears the burden of proving by a preponderance of the evidence
3 that the amount in controversy exceeds [\$75,000].” *Singer v. State Farm Mut. Auto. Ins.*
4 *Co.*, 116 F.3d 373, 376 (9th Cir. 1997). To meet its burden, the defendant “must provide
5 evidence establishing that it is ‘more likely than not’ that the amount in controversy
6 exceeds [\$75,000].” *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir.
7 1996).

8 Defendants argue that Plaintiffs certified in state court that this case was not
9 subject to mandatory arbitration because the damages, including punitive damages,
10 exceeded \$50,000. Plaintiffs’ certification, however, says only that the damages sought
11 will exceed \$50,000; it says nothing determinative about the likelihood that damages will
12 exceed \$75,000.

13 Defendants argue that other food poisoning cases have resulted in settlements or
14 verdicts in excess of \$75,000, citing cases from Florida, Mississippi, and Texas. The fact
15 that three cases resulted in recoveries of greater than \$75,000 for food poisoning,
16 however, does not establish by a preponderance of the evidence that the claim in this case
17 will exceed \$75,000. In addition, some of the cases cited by Defendants included e-coli
18 poisoning, but Defendants themselves argue in their motion to dismiss that such
19 poisoning did not occur in this case.

20 Defendants assert that Plaintiffs seek to recover attorneys’ fees. Attorneys’ fees
21 may be included in the amount in controversy, however, only if they were incurred prior
22 to the date of removal; future attorneys’ fees are too speculative to be included. *Dukes v.*
23 *Twin City Fire Ins. Co.*, CV-09-2197-PHX-NVW, 2010 WL 94109 at *2 (D. Ariz. Jan. 6,
24 2010). Defendants fail to identify attorneys’ fees incurred before removal. Moreover,
25 Defendants argue in their motion to dismiss that attorneys’ fees are not available under
26 A.R.S. § 12-341.01 in this tort case.

27 Finally, Defendants claim the jurisdictional minimum is satisfied by Plaintiffs’
28 assertion of a claim for punitive damages. The Court concludes, however, that the

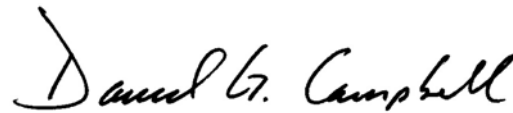
1 prospect of punitive damages fails to satisfy Defendants' burden of establishing this
2 Court's jurisdiction by a preponderance of the evidence. The amount of punitive
3 damages that may be awarded in this case is entirely speculative. *See Haisch v. Allstate*
4 *Ins. Co.*, 942 F. Supp. 1245, 1249 (D. Ariz. 1996) ("It would be inherently speculative for
5 this Court to conclude that the amount in controversy requirement can be met by simply
6 asserting that large punitive damages have been awarded in the past against insurance
7 companies Defendant has failed to articulate why the particular facts that are
8 alleged in the instant action might warrant extraordinary punitive damages"). Moreover,
9 Defendants correctly note in their motion to dismiss that Plaintiffs have failed to plead
10 the "evil mind" required for punitive damages under Arizona law. *See Volz v. Coleman*
11 *Co.*, 748 P.2d 1191, 1194 (Ariz. 1987).

12 As noted above, this Court should remand a matter to state court if there is any
13 doubt about the Court's jurisdiction. The Court finds substantial doubt that the amount in
14 controversy in this case will exceed \$75,000, and therefore will remand the case to state
15 court. *See Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1118 (9th Cir. 2004) ("If the
16 district court determines that it is sufficiently doubtful that the amount-in-controversy
17 requirement has been met and thus that federal subject matter jurisdiction is lacking, the
18 district court should . . . remand to state court").

19 Plaintiffs have filed a motion for sanctions which argues that Defendants' removal
20 of this action violated Rule 11(b) because it was undertaken for an improper purpose.
21 Doc. 11. The Court is not persuaded. Although Defendants have failed to satisfy the
22 burden necessary to maintain jurisdiction in this Court, Defendants had a colorable basis
23 for asserting that removal was proper. The motion for sanctions will be denied.

1 **IT IS ORDERED** that Plaintiffs' motion to remand (Doc. 13) is **granted** and
2 motion for sanctions (Doc. 11) is **denied**. The Clerk shall remand this case to Maricopa
3 County Superior Court.

4 Dated this 25th day of February, 2013.

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9 David G. Campbell
10 United States District Judge
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